Aug 15 2001

Supreme Court, U.S.
FILED
AUG 15 2001

No. 99-1823

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Nothing in the Federal Arbitration Act (FAA) requires public enforcement agencies such as the EEOC to arbitrate disputes they have not agreed to arbitrate, or to forgo available forms of relief they have not agreed to forgo. Title VII and the Americans with Disabilities Act (ADA) authorize the EEOC to seek the full range of statutory remedies, including damages and other victim-specific relief, in a public enforcement action. The EEOC does not operate as the employee's agent or subrogee in a public enforcement action; the EEOC may choose its preferred forum and bring suit even when the victim does not seek to vindicate his own rights. Allowing the EEOC to obtain all authorized statutory remedies in an enforcement action arising out of events concerning an employee who has signed an arbitration agreement does not conflict with the terms

and policies of the FAA. The EEOC has not agreed to arbitrate any aspect of *its* dispute with the employer. Respondent's argument is based on two premises. Respondent contends (1) that "EEOC is wrong to argue that precluding it from obtaining individual-specific remedies is contrary to Title VII's enforcement provisions," Resp. Br. 18, and (2) that the FAA "compelled the Fourth Circuit's decision," *id.* at 12. Both contentions are mistaken.

I. TITLE VII UNAMBIGUOUSLY GIVES THE EEOC THE RIGHT TO RECOVER VICTIM-SPECIFIC RELIEF

Title VII and the ADA unambiguously give the EEOC the right to obtain the full range of statutory remedies and draw no distinction between victim-specific and broad injunctive relief. Nonetheless, the court of appeals precluded the EEOC from obtaining any victim-specific relief—legal or equitable—whenever the victim had signed an arbitration agreement. Respondent does not directly embrace the Fourth Circuit's reasoning. Instead, respondent argues (Br. 18) that "Title VII authorizes EEOC to secure only 'appropriate' relief," Resp. Br. 8 (citing 42 U.S.C. 2000e-5(g)(1)), and that victim-specific relief is not "appropriate" in an EEOC action if the victim of discrimination (but not the EEOC) has signed an arbitration agreement. *Id.* at 8-9, 18-19. See also Br. of Amicus Council for Employment Equity 8-13. The court of appeals did not rely on this "appropriate relief" argument, and with good reason.

A. The "As May Be Appropriate" Standard On Which Respondent Relies Does Not Govern Legal Relief Under Title VII

The first problem with respondent's appropriate-relief argument is that it does not support the holding below. Title VII and the ADA have two distinct provisions that govern remedies. The first, Section 706(g)(1), on which respondent relies, governs equitable relief. That provision states that

> [i]f the court finds that the [defendant] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the [defendant] from engaging in such unlawful employment practice, and order *such affirmative action as may be appropriate*, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate.

42 U.S.C. 2000e-5(g)(1) (emphasis added). The second, Section 1981a, governs damages. Section 1981a provides that in an action under Title VII,

> the complaining party *may recover* compensatory and punitive damages, as allowed in [42 U.S.C. 1981a(b)], in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

42 U.S.C. 1981a(a)(1)-(2) (emphasis added).

The "complaining party may recover" formulation of Section 1981a, by its terms, gives the EEOC (which is defined by statute as a "complaining party," see U.S. Br. 18-19) a mandatory right to obtain damages if it can satisfy the ordinary prerequisites for damages. The

standard legal definition of the term "may" is "[i]s permitted to." *Black's Law Dictionary* 993 (7th ed. 1999). Thus, the EEOC "is permitted to" recover whatever damages it can prove in a Title VII or ADA case. As in other circumstances, "[c]ompensatory damages * * * are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss." *Smith* v. *Wade*, 461 U.S. 30, 52 (1983); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 442 (1975) (Rehnquist, J., concurring) (award of damages "upon proper proof would follow virtually as a matter of course from a finding that an employer had unlawfully discriminated").[1]

By basing its argument on a discretion-conferring provision that applies only to equitable relief, respon-

[1] The formulation "may recover" is used dozens of times throughout the U.S. Code to give a party the legal right to recover damages. Among the examples, with emphasis added in each, are: 7 U.S.C. 2022(c)(3)(ii) ("A State agency *may recover* an uncollected overissuance [of food stamp coupons] * * * by obtaining a writ, order, summons, or other similar process in the nature of garnishment from a court of competent jurisdiction."); 7 U.S.C. 2157(d) ("Any person * * * injured * * * by reason of [an unlawful release of certain confidential information] *may recover* all actual and consequential damages sustained by such person."); 12 U.S.C. 86 (in case of usurious interest, "the person by whom it has been paid, * * * *may recover* back, in an action in the nature of an action of debt, twice the amount of the interest"); 12 U.S.C. 1715z-4a(c) (1994 & Supp. V 1999) (In an action for unauthorized use of multifamily housing project assets or income, "the Attorney General *may recover* double the value of the assets and income of the project that the court determines to have been used in violation of the regulatory agreement."); 28 U.S.C. 2718 ("In suits for balances due the Post Office Department *may recover* interest at the rate of 6 per centum per year from the time of default.").

dent's leaves much of the court of appeals' holding essentially undefended. That holding precluded the EEOC from seeking *any* victim-specific relief, and damages are the classic form of victim-specific relief. Yet, with respect to damages, respondent can point to no textual (or other) basis to dispute the EEOC's clear entitlement to seek damages.[2]

B. Precluding Victim-Specific Equitable Relief Would Contradict Title VII And Therefore Would Not Be "Appropriate"

Respondent asks this Court to interpret Title VII's grant of discretion to fashion equitable relief to limit the EEOC's remedial options. However, this Court's precedents make clear that Congress gave district courts discretion to ensure complete relief, not to frustrate Title VII's objectives. In *Albemarle Paper*, for example, this Court rejected the argument that Section 706(g)(1) grants district courts broad discretion to deny back pay to Title VII plaintiffs. The Court explained that "Congress' purpose in vesting a variety of 'discretionary' powers in the courts was," not to give victims the bare minimum recovery, but "to make possible the fashioning of the most complete relief possible." 422 U.S. at 421 (internal quotation marks and brackets omitted). The Court noted that, although "backpay is not an automatic or mandatory remedy," *id.* at 415, a district court must exercise its discretion "in light of the larger objectives of the Act," *id.* at 416 (citation omitted). Specifically, courts should exercise

[2] Respondent's textual argument actually applies only to a subset of authorized victim-specific equitable relief. The "as may be appropriate" language in Section 706(g)(1) governs only reinstatement, back pay, and "other" equitable relief; it does not apply to injunctions, whether or not they are victim specific.

remedial discretion with an eye to "the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421. Denying the EEOC statutorily authorized remedies for discrimination on the basis of the victim's arbitration agreement does not serve either of these objectives.

Congress did not grant courts remedial discretion to issue such equitable relief "as may be appropriate" so that courts could restrict Title VII remedies to further the policies of other federal statutes. Instead, Congress provided for broad remedial discretion in order "to allow the most complete achievement of the objectives *of Title VII*." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 770-771 (1976) (emphasis added). Consequently, this Court has rejected the argument that other federal policies justify restricting remedies expressly authorized by Title VII. In *Franks* and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45 (1974), the Court rejected efforts to limit the remedies in, and availability of, individual actions, despite alleged conflicts with federal policies favoring collective bargaining. In *General Telephone Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 330-332 (1980), the Court upheld the Commission's ability to bring enforcement actions on behalf of groups of employees, despite an alleged conflict with the policies embodied in Rule 23. What this Court said in *General Telephone* applies with equal force here: "We are reluctant, absent clear congressional guidance, to subject § 706(f)(1) actions to requirements that might disable the enforcement agency

from advancing the public interest in the manner and to the extent contemplated by the statute." *Id.* at 331.[3]

Restricting the remedies available to the EEOC in the manner proposed by respondent would clearly undermine the language and broader purposes of Title VII. Congress expressly made the full range of statutory remedies available to the EEOC, both in the 1972 amendments, which enhanced the remedies available in EEOC enforcement actions, and in the 1991 amendments, which made damages available to all complaining parties, including the EEOC. Respondent would reverse the effect of those amendments whenever a victim has signed an arbitration agreement. See U.S. Br. 37-38.

Respondent's proposed rule would produce other anomalous results that would frustrate Title VII's objectives. In the absence of valid arbitration agreements, the EEOC may bring an enforcement action against an employer and seek victim-specific relief, even if the victim does not wish to pursue an individual claim. If the employer requires employees to arbitrate

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[3] Section 706(g)(1)'s authorization for courts to order appropriate relief is designed to give district courts the discretion to grant complete relief "to locate 'a just result' in light of the circumstances peculiar to the case." *Albemarle Paper*, 422 U.S. at 424 (quoting *Langnes* v. *Green*, 282 U.S. 531, 541 (1931)). Accord *Franks*, 424 U.S. at 770-771. That language does not support respondent's proposed *categorical* rule that victim-specific relief is *never* appropriate in EEOC actions involving victims who have agreed to arbitrate. See, *e.g.*, *id.* at 779; *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 362 (1995) (rejecting "[a]n absolute rule barring any recovery of backpay," whenever there is after-acquired evidence of employee misconduct); cf. *ABF Freight Sys., Inc.* v. *NLRB*, 510 U.S. 317 (1994) (rejecting a categorical rule prohibiting NLRB awards of reinstatement and back pay to victims who gave false testimony).

disputes, however, respondent's rule would completely immunize the employer from victim-specific relief whenever the victim does not pursue an individual claim. The rule also could complicate the EEOC's efforts to seek relief on behalf of a broad group of employees only some of whom have signed arbitration agreements. *General Telephone* makes clear that the EEOC has the authority to seek relief for multiple employees, but the court of appeals' rule would force the court to limit the availability of victim-specific relief to employees unencumbered by an arbitration agreement. Respondent's rule also would undermine the congressionally mandated conciliation process. See *pp.* 17-18, *infra.*

Finally, respondent's appropriate-relief argument suffers an additional conceptual flaw. Arbitration agreements generally govern the right to sue in court, and have only an incidental effect on the availability of remedies. When a dispute is subject to arbitration, the whole dispute, not just certain remedies, must be arbitrated. Respondent's arbitration agreement is no different; it categorically precludes the victim from bringing any Title VII claim in federal court. In light of the arbitration agreement's complete elimination of the employee's right to sue in court, it is not at all clear why, in respondent's view, that agreement does not preclude the EEOC's right to sue, but does limit the EEOC's right to seek certain remedies. There is simply no reason why an agreement that, by its terms, limits the parties' access to court, but not available remedies, should manifest itself as a limit on a non-party's available remedies, but not on its access to court.

II. BECAUSE THE EEOC HAS NOT AGREED TO ARBITRATE ITS CLAIMS, THE FEDERAL ARBITRATION ACT DOES NOT LIMIT THE EEOC'S RIGHTS IN LITIGATION

A. The Policies Of The FAA Do Not Support Limiting The EEOC's Available Remedies In A Dispute The EEOC Did Not Agree To Arbitrate

The EEOC's ability to obtain the full range of statutory remedies in a public enforcement action involving a victim who signed an arbitration agreement is entirely consistent with the FAA. Respondent contends that there is a "tension between the FAA and the anti-discrimination statutes" (Br. 14) that must be "harmonized" (Br. 16) by precluding the EEOC from obtaining victim-specific relief authorized by Title VII. If there were any such "tension" between the text of Title VII and the policies of the FAA, its appropriate resolution would be to enforce the text of Title VII and leave Congress the task of amending the statutes to accommodate any policy concerns not currently reflected in the statutory text. There is, however, no such "tension."

The operative provision of the FAA simply provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. The FAA, "as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). Accordingly, "just as [a party] has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all." *John Wiley &*

Sons, Inc. v. *Livingston*, 376 U.S. 543, 547 (1964). See also *AT&T Techs., Inc.* v. *Communications Workers*, 475 U.S. 643, 648 (1986) ("party cannot be required to submit to arbitration any dispute which he has not agreed so to submit") (citation omitted). The EEOC has never entered into a private contractual arrangement with respondent. The FAA's "pro-arbitration policy" (Resp. Br. 18), therefore, does not impose any limitation on an EEOC public enforcement action.

Respondent clearly seeks to bind the EEOC through an arbitration agreement to which the EEOC never consented. Absent a binding arbitration agreement between an employer and employee, the employee can sue its employer in court (and seek all available remedies) and the EEOC can bring its own independent enforcement action in court (and seek all available remedies). Respondent insists that by signing an arbitration agreement with its employee, not only does the employee, who is a party to the agreement, give up his right to sue, but a non-party, the EEOC, somehow loses its right to seek certain remedies in its own enforcement action. The policies of the FAA are completely vindicated by honoring the arbitration agreement *between the parties*. But extending that agreement to limit the rights of third parties not only is unnecessary to further the policies of the FAA, but actually undermines those policies, which are based on consent.[4]

[4] Because the arbitration agreement binds the parties, it would preclude the employee from intervening in the EEOC's enforcement action. But see Resp. Br. 29. That preclusion could be significant because the EEOC is bound in a public enforcement action to advance the public interest, rather than the individual employee's interests. See U.S. Br. 29-30.

B. The EEOC Is Not Bound To The Employee's Arbitration Agreement As The Employee's Agent

1. Respondent argues (Br. 32) that its arbitration agreement can bind the EEOC because "a non-party to an arbitration agreement may be compelled to arbitrate in a variety of circumstances." Respondent's authorities, however, do not support its attempt to bind the EEOC to an arbitration agreement the EEOC did not sign.

Respondent's primary authority is *Thomson-CSF, S.A.* v. *American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995). In that case, the court *refused* to require a non-party to submit a dispute to arbitration. The court appropriately relied on the principle that "[a]rbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so." *Id.* at 779 (citing *United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). To be sure, the court did note, in dictum, "that a nonsignatory party may be bound to an arbitration agreement if so dictated by the 'ordinary principles of contract and agency.'" *Id.* at 776 (citation omitted). But the court's discussion of those principles and the situations in which non-parties are bound by arbitration agreements makes clear that there is no precedent for binding the EEOC here. Courts have found non-parties bound by arbitration agreements when the non-party had assumed the duties of, or knowingly accepted the benefits of, the contract containing the arbitration agreement, *id.* at 777-778, or when the non-party was an agent or corporate alter ego of a party to the agreement, *ibid.*

In this case, as in *Thomson-CSF*, there is no basis for holding the non-party (here, the EEOC) to the arbitra-

tion agreement. The EEOC has not assumed the contractual obligations of the victim of discrimination or accepted the benefits of the victim's employment contract. The EEOC is not an agent of the victim, because the victim in no way exercises control over the EEOC —the first prerequisite of an agency relationship. See Restatement (Second) Agency §§ 1, 14 (1958). And, obviously, there is no corporate veil-piercing issue involved in this case.

2. An additional problem with respondent's effort to bind the EEOC to the arbitration agreement as the employee's agent is that respondent seeks to avoid the logical implications of its argument. Assuming it is binding, the arbitration agreement between respondent and Mr. Baker prevents Baker from bringing any court action alleging any ADA violation, whether it seeks relief equitable or legal, broad or narrow. If (contrary to fact) the EEOC were bound by the agreement as Baker's agent, the EEOC likewise could not bring any ADA action, without regard to the relief sought. In light of the EEOC's statutory right to bring public enforcement actions and the Fourth Circuit's holding, respondent does not advance that position. However, the compromise position to which respondent retreats —that the EEOC is barred only from obtaining some (*i.e.*, victim-specific) relief—has no grounding in either respondent's arbitration agreement, which limits the parties' right to sue, not remedies, or the policies of the FAA.[5]

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[5] Moreover, the compromise position that respondent and the Fourth Circuit embrace is a result Congress clearly rejected in the 1972 amendments giving the EEOC the right to obtain individual, victim-specific relief even in non-"pattern or practice" cases. See U.S. Br. 28-29, 35-36.

C. Respondent Cannot Restrict The EEOC's Enforcement Authority On The Theory That The EEOC Is The Employee's Subrogee Or Based On Principles Of Res Judicata

1. More generally, binding the EEOC through the victim's arbitration agreement conflicts with Congress' decision to give the EEOC its own independent enforcement action. Respondent attempts to portray the EEOC as a mere subrogee that "stands in the shoes" of the individual victim of discrimination. See Resp. Br. 10, 30-32. The EEOC, however, is a public enforcement agency that does not merely stand in the shoes of victims of discrimination. Title VII and the ADA give the EEOC an independent cause of action that is in critical respects superior to an individual's claim and that the EEOC can pursue even against the victim's wishes. That public enforcement action is not something the employee can bargain away in an arbitration agreement with his employer.

Congress structured Title VII so that the EEOC's right to bring suit and obtain relief is independent of the private victim. See U.S. Br. 20-21. Under the terms of Title VII, the EEOC may bring suit and obtain all forms of relief authorized by statute without naming the victim as a party and regardless of whether the victim intervenes. Indeed, respondent does not dispute that the EEOC may bring suit and obtain relief, even if the individuals for whom it seeks relief disavow the suit and claim not to want relief. See *ibid.* (citing cases). Congress could have denied the EEOC any right to bring public enforcement actions without the employee's consent or limited the EEOC to seeking "broad equitable relief" in such cases, but it did neither. As with the Fair Labor Standards Act, "the purposes of

[Title VII] require that it be applied even to those who would decline its protections." *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 302 (1985).

In addition, the antidiscrimination laws give the EEOC particular control over the early phases of the enforcement process. To facilitate investigation and conciliation, the EEOC has the exclusive right to litigate for a period after the filing of a complaint. See 42 U.S.C. 2000e-5(f)(1). If the EEOC decides to bring an enforcement action, the victim has no control over the EEOC's choice of forum and no right to bring an action in another forum. See U.S. Br. 21-22. It would be particularly inappropriate to allow an arbitration agreement to trump the EEOC's statutory rights over the forum, when such an agreement "is, in effect, a specialized kind of forum-selection clause." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). In sum, Title VII gives the EEOC a public enforcement action to remedy the public wrong of discrimination that does not simply mirror the private cause of action given the victim. Accordingly, the victim's decision to arbitrate its private action does not bind the EEOC in pursuing its public enforcement action.

2. Respondent also tries to minimize the peculiarity of binding the EEOC to the terms of an arbitration agreement it did not sign by emphasizing that "[t]here are recognized circumstances under which an individual's conduct limits" the amount of damages in an EEOC enforcement action. Resp. Br. 29. But those "recognized circumstances" do not support extending respondent's arbitration agreement to limit the EEOC's remedies. There are specific rules, discussed above, for deciding whether a non-party is bound by an arbitration agreement, and those rules provide no basis

for holding the EEOC to the terms of respondent's agreement.

The fact that Title VII incorporates well-established principles of the law of damages does not alter that conclusion. Arbitration agreements generally incorporate, rather than alter, the substantive law of damages. Accordingly, the principles respondent cites, such as the rule that the victim must mitigate damages, see 42 U.S.C. 2000e-5(g), apply whether an action is litigated or arbitrated. Respondent's proposed rule, by contrast, would make a victim's agreement to arbitrate, which generally does not affect his remedies in arbitration, limit the remedies available to the EEOC in court. That makes no sense. Indeed, it only reinforces the problems with respondent's efforts to take an arbitration agreement, which governs the parties' ability to sue in court, and turn it into a limitation on the remedies available to a non-party.

3. Respondent also relies (Br. 30-31) on a line of cases that have held that a settlement or judgment in a private suit or arbitration proceeding between employee and employer may limit the EEOC's remedies in a subsequent public enforcement action. Here, there is no prior private judgment or settlement, and respondent's cases are accordingly inapposite. See U.S. Br. 38-39 n.13.

Respondent's cases rely primarily on principles of res judicata to hold the outcome of private litigation or arbitration preclusive of the EEOC's remedies. See U.S. Br. 38-39 n.13. Res judicata principles, however, involve considerations not pertinent in the absence of prior litigation. As then-Justice Rehnquist explained, "the judiciary retains an independent interest in preventing the misallocation of judicial resources and second-guessing prior panels of Art. III judges when

the issue has been fully and fairly litigated in a prior proceeding." *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 433 (1980) (Rehnquist, J., dissenting).[6] Congress recognized that independent interest of the judiciary by structuring the Title VII enforcement scheme to avoid duplicative litigation; an employee may not bring his own suit once the EEOC has commenced litigation.[7]

The interest in avoiding duplicative litigation does not apply where the employee has taken no action to arbitrate or litigate his claim. The Court recognized a similar distinction in *General Telephone* when it reaffirmed the EEOC's right to bring an enforcement action on behalf of employees generally when they have not sued separately, but cautioned that "courts can and should preclude double recovery by an individual." 446 U.S. at 333. Far from avoiding duplicative litigation, respondent's rule would virtually require it by forcing the private individual to seek victim-specific relief in arbitration while the EEOC seeks broader relief in court. See U.S. Br. 39-40. In any event, petitioner's res

[6] See also *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (noting that res judicata's role in preserving judicial resources means that "trial courts may in appropriate cases raise the res judicata bar on their own"); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979) ("[Res judicata] has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.").

[7] Moreover, in many of respondent's cases, the individual signed a settlement agreement specifically extinguishing his right to additional relief. In that situation, allowing the EEOC to recover relief on behalf of the victim would conflict with that agreement. But there is no such conflict here. An arbitration agreement addresses the distinct issue of the right to sue in court, but does not extinguish the right to individual relief.

judicata cases are beside the point. As discussed above, there are specific rules that govern who is bound by an obligation to arbitrate. Those rules are distinct from res judicata principles and make clear that the EEOC is not bound by respondent's agreement.

D. Allowing The EEOC To Pursue All Statutory Remedies Promotes Conciliation And Respects Employers' Legitimate Expectations

Respondent argues (Br. 21) that the antidiscrimination laws "expressly encourage[] the use of arbitration," relying on Congress's statement of policy that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes" under the antidiscrimination laws. 42 U.S.C. 1981 note; 42 U.S.C. 12212. But this provision, like the FAA, encourages arbitration only when the parties have consented to arbitration. It does not encourage forcing the EEOC to arbitrate or forgo remedies absent such consent.

Moreover, respondent's rule would undermine "conciliation"—the form of alternative dispute resolution Congress required in cases brought by the EEOC. Congress requires the EEOC to endeavor to eliminate unlawful employment practices "*by informal methods of conference, conciliation, and persuasion.*" 42 U.S.C. 2000e-5(b) (emphasis added). Indeed, the EEOC may not bring an enforcement action unless it "has been unable to secure from the respondent a conciliation agreement acceptable to the Commission." 42 U.S.C. 2000e-5(f)(1). The threat of an EEOC enforcement action generally gives employers a strong incentive to resolve disputes in the EEOC's conciliation process. By

severely restricting the remedies available to the EEOC in court, respondent's rule would dull employers' incentives to engage in meaningful conciliation.

Finally, permitting the EEOC to use all available remedies could have only a *de minimis* impact on arbitration and legitimate employer expectations. Respondent agrees that, as a practical matter, the EEOC's litigation represents only a tiny fraction of all employment discrimination litigation. Compare U.S. Br. 26 & n.9 with Resp. Br. 35 ("EEOC is an almost non-existent player in enforcement litigation."). Accordingly, permitting the EEOC to obtain all statutorily authorized forms of relief in cases it does bring could have at most only a *de minimis* impact on the expectations of employers and the policies of the FAA.

Precluding the EEOC from obtaining full relief, however, would have a negative effect on the much larger number of cases that go through the conciliation process and would have a substantial impact on the EEOC's limited litigation program. The EEOC carefully selects the small number of cases it litigates, based on the public interest in those cases. If the EEOC is barred from seeking victim-specific relief in even a few cases, it could have a substantial negative impact on the deterrent effect of the EEOC's very modest overall litigation program. Cf. *Albemarle Paper*, 422 U.S. at 417 ("If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."); see also U.S. Br. 37.

Moreover, in situations like this in which an employer requires all prospective employees to sign arbitration agreements, legal issues concerning victim-specific aspects of the employer's conduct, such as whether a practice justifies an award of back pay or punitive

damages, will be completely shielded from judicial inquiry. See U.S. Br. 36-37 & n.12. Respondent's rule thus could preclude judicial development of certain important issues, despite this Court's observation that "judicial construction has proved especially necessary with respect to Title VII." *Alexander*, 415 U.S. at 57; see also *McKennon*, 513 U.S. at 358-359. On the other hand, respecting employees' agreements to arbitrate, but allowing the EEOC to act as a safety valve that ensures the possibility of a judicial hearing on all issues in the most critical cases respects employers' legitimate expectations while permitting the full vindication of Title VII and the ADA.

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For the reasons given above, as well as those in our opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2001